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Independent Human Rights Act Review
Response from the Senators of the College of Justice

The Independent Review is examining, amongst other things, how the framework of the Human Rights Act 1998 is operating in practice. The Lord President has prepared a summary of the law of Human Rights in Scotland in the form of a *Short Judicial Perspective* to address that matter in general, which is annexed to this response.

The judges do not comment on matters of government or parliamentary policy. Below the judges offer a judicial perspective on the questions posed on the basis of our practical experience of Scottish cases involving the Convention rights. The observations, which are expressed, relate to the manner in which human rights law has operated in practice with a view to identifying any problem areas. They are not intended to state any preference on the manner which, as a matter of political judgment, it should operate in the future.

1. The relationship between domestic courts and the European Court of Human Rights

a) How has the duty to "take into account" ECtHR jurisprudence been applied in practice? Is there a need for any amendment of section 2?

In *Moohan* v *Lord Advocate* 2015 SC 1, which dealt with the right of prisoners to vote in the independence referendum, the court, after considering the English jurisprudence, set out (at paras 23-24) the approach to be taken in the Scottish courts as follows:

> "…in taking into account the Strasbourg case law, [the court] will normally follow clear and constant jurisprudence emerging from the Strasbourg court and will not innovate by a generous interpretation of the Convention in the absence of some clear understanding of that being the direction in which the Strasbourg jurisprudence will inevitably follow."

Having regard to the development of the law as set out in the paper annexed, from a judicial, operational viewpoint there is no identifiable mischief that necessitates amendment of section 2.

b) When taking into account the jurisprudence of the ECtHR, how have domestic courts and tribunals approached issues falling within the margin of appreciation permitted to States under that jurisprudence? Is any change required?

The approach to the margin of appreciation by the court depends on the circumstances of the particular case. For example, in the socio-economic context, there is a wide margin of appreciation. Considerable weight will be given to decisions of a representative legislature and a democratically elected government within the discretionary area of judgement accorded to those bodies (*Axa General Insurance* v *Lord Advocate* 2012 SC (UKSC) 166 at para 131). If the issue is whether something is in accordance with the law, the concept of margin of appreciation may have no part to play (*Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29 at para 80; see also, for example, *P v Scottish Ministers* 2017 SLT 271).

Cases in the last five years which are indicative of the approach of the Court of Session to the margin of appreciation include the following:

- *In Prior* v *Scottish Ministers* 2020 SC 528 the court was considering whether provisions which allowed permission for judicial review to be determined without an oral

hearing were compatible with Article 6. The court noted that the state enjoyed a margin of appreciation in imposing restrictions on the right of access to the court, subject to the requirement that the essence of the right must not be impaired (para 53), before going on to examine the nature and effect of the provisions in question;

- *Shell UK* v *Stichting Greenpeace Council* 2020 SLT 235 was an application for interim interdict to prohibit environmental protestors from boarding partly decommissioned offshore installations, and from coming within 500 metres of them. There was statutory provision for a safety zone of 500m around such installations which made entering the zone a criminal offence. The defenders argued that the circumstance that conduct was criminal was not determinative in the context of an interference with their rights to freedom of expression and assembly. The Lord Ordinary (judge at first instance) considered that the statutory provisions were significant in determining whether an interference by way of interim interdict was proportionate, noting (para 56) that the regulations were directed at the safety on, and of, offshore installations, and that in the context of provisions genuinely so directed the state had a wide margin of appreciation so far as interferences with Article 10 and 11 rights were concerned;
- *Nyamayaro* v *Secretary of State for the Home Department* 2019 SC 537 involved a challenge to a reduction in asylum support for essential living needs. One aspect of the challenge was a contention was that the state discriminated unlawfully between children of asylum seekers and children of settled adults in need of social assistance, for the purposes of Article 14. In reaching a decision which accorded with those in England, the court noted the broad margin of appreciation afforded to the state in matters of social and economic policy: para 145;
- *Accountant in Bankruptcy* v *Walker* 2017 SLT 890 was an action for payment of money which the pursuer contended was a gratuitous alienation. The defender argued that that the relevant provisions of the Bankruptcy (Scotland) Act 1985 were incompatible with the rights protected by Article 8, Article 14 and A1P1. The Lord Ordinary proceeded on the basis that Parliament had a wide margin of appreciation in the context of A1P1 where matters of discretionary judgment, involving a balance between the rights of the individual and the general interest of the community in the implementation of social or economic policy, were involved;
- *McMaster* v *Scottish Ministers* 2018 SC 546 was a sequel to *Salvesen* v *Riddell* 2013 SC (UKSC) 236, after which the Scottish Ministers made a remedial order. The petitioners argued the order was incompatible with their A1P1 rights. The court noted the scope of the discretionary area of judgment in the field of social and economic policy. The order was not itself incompatible with A1P1;
- *Laverie* v *Scottish Ministers* 2017 SLT 640 concerned a decision of the Scottish Ministers to remove a member of a college board. The petitioner challenged the order (under Article 11 and A1P1) and the statutory provisions under which it was made (under reference to Article 6). The Lord Ordinary found that A1P1 was not engaged, but observed that, if it had been, substantial weight required to be given to the Ministers'

exercise of judgment in the context of allegations of mismanagement by the board of a public sector college (para 154);

- *P* v *Scottish Ministers* 2017 SLT 271 was a challenge to a requirement for disclosure of a criminal conviction. The petitioner was a carer who had been made the subject of a supervision requirement by a children's hearing in 1987, in respect of lewd and libidinous practices. When considering whether an admitted interference with Article 8 rights was in accordance with the law, there was no place for deference. It was not a matter in relation to which a margin of appreciation was permitted (paras 48-58);
- *A* v C*riminal Injuries Compensation Board* 2017 SLT 984 involved a challenge to the "same roof" rule in criminal injuries compensation. The court considered whether objective and reasonable justification had been provided for interfering with the appellant's right to property, applying the "manifestly without reasonable foundation" test, as the policy decision in question fell within the field of socio-economic policy and the allocation of finite resources (paras 39-43);
- In *Hunter* v *Student Awards Agency* 2016 SLT 653 a 56 year old student sought review of a decision to refuse her application for a student loan, founding on A2P1 and Article 14. The regulations restricted eligibility to persons under the age of 55. The Lord Ordinary distinguished the situation, which related to education, from cases dealing with welfare benefits, and declined to apply in the context of age discrimination, the "manifestly without reasonable foundation" test (paras 40-50);
- On the criminal side, the margin of appreciation which was available when competing interests were in issue was stressed in *Sutherland* v *HM Advocate* 2020 SC (UKSC) 66 (paras 67-68). There was no obligation under Article 8 to protect a person's privacy in a manner which would impede the investigation and prosecution of crimes arising from his communications with a child (cf again discrimination in *AB* v *HM Advocate* 2017 SC (UKSC) 101 (para 37)).

From a judicial, operational viewpoint, and having regard to the development of the jurisprudence as set out in the annexed paper, there is no obvious need for change.

c) Does the current approach to 'judicial dialogue' between domestic courts and the ECtHR satisfactorily permit domestic courts to raise concerns as to the application of ECtHR jurisprudence having regard to the circumstances of the UK? How can such dialogue best be strengthened and preserved?

This is dealt with in the annexed paper. The Scottish courts have not had occasion to disagree with the decisions of the European Court. A useful example of judicial dialogue was provided in *Maguire* v *United Kingdom* (2015) 60 EHRR SE12. Mr Maguire had been convicted by a sheriff of a breach of the peace by wearing a top with certain provocative slogans on it at an Old Firm (Rangers v Celtic) football match. The High Court of Justiciary upheld the conviction ([2013] HCJAC 36) and rejected a submission that there had been a breach of the

Article 10 right to freedom of expression. The European Court emphasised (at para 54) that national authorities were better placed than itself to understand and appreciate specific societal problems faced in particular communities and contexts. The presence of sectarian violence at (certain) Scottish football matches had been identified by those best qualified to do and there was no reason to call into question the veracity of the finding or the sincerity of the efforts to eradicate it.

The criminal justice system has adjusted itself to cope with practical consequences of the incorporation of Convention rights with the change from devolution to compatibility issues. The civil system has done the same, but in a different way, with the new permission provisions. In both areas, the Scottish judiciary, and practitioners, are now familiar with the place of the Convention in the domestic legal setting. The senior judiciary continue to have a real and meaningful dialogue with their colleagues in Strasbourg.

2. The impact of the HRA on the relationship between the judiciary, the executive and the legislature

a) Should any change be made to the framework established by sections 3 and 4 of the HRA? In particular:

(i) **Are there instances where, as a consequence of domestic courts and tribunals seeking to read and give effect to legislation compatibly with the Convention rights (as required by section 3), legislation has been interpreted in a manner inconsistent with the intention of the UK Parliament in enacting it? If yes, should section 3 be amended (or repealed)?**

There is a circular aspect to this question. In seeking to give effect to legislation in a manner which is compatible with Convention rights, and thereby applying section 3 to any statutory provision, the courts are giving effect to the intention of the UK Parliament as expressed in that section.

Whether the intention of Parliament should take precedence over the rights in the Convention when interpreting legislation is not a matter for judicial comment.

(ii) If section 3 should be amended or repealed, should that change be applied to interpretation of legislation enacted before the amendment/repeal takes effect? If yes, what should be done about previous section 3 interpretations adopted by the courts?

If there were to be amendment, the maintenance of legal certainty is important. This is more likely to be achieved by the amended law applying only to situations which occur after the amendment comes into force. Previous section 3 interpretations should remain law unless they are expressly, or by implication, changed by legislation.

(iii) Should declarations of incompatibility (under section 4) be considered as part of the initial process of interpretation rather than as a matter of last resort, so as to enhance the role of Parliament in determining how any incompatibility should be addressed?

Declarations of incompatibility of UK legislation neither affect the impugned legislation nor are they binding on the parties (Human Rights Act 1998 s 4(6)). If declarations of incompatibility were to be the primary relief, issues of effective remedy arise. It is generally accepted that the Convention should be applied in a manner that is practical and effective, so that the Convention rights of those affected are properly recognised and enforced (eg *McMaster* v *Scottish Ministers* 2018 SC 546 at para 18).

A consequence of any change may be that there will be an increase in applications to the European Court.

b) What remedies should be available to domestic courts when considering challenges to designated derogation orders made under section 14(1)?

This issue has not come before the Scottish courts. There is no immediate reason to augment, or detract from, the normal range of comprehensive judicial remedies.

c) Under the current framework, how have courts and tribunals dealt with provisions of subordinate legislation that are incompatible with the HRA Convention rights? Is any change required?

Broadly speaking, the court considers first what the parties' domestic rights and obligations are, and how they have been affected by legislation (*McMaster* v *Scottish Ministers* 2018 SC 546 at para 21). The court then considers whether: the particular Convention right relied on is engaged; that right is violated; and a Convention compatible interpretation can be achieved (having regard among other things to section 3(2)(c) of the Human Rights Act 1998). A challenge to subordinate legislation may by this stage have failed (eg *Nyamayaro* v *Secretary of State for the Home Department* 2019 SC 537, *McMaster* v *Scottish Ministers* 2018 SC 546, *Laverie* v *Scottish Ministers* 2017 SLT 640). If the court finds that no Convention compliant interpretation of the impugned subordinate legislation can be achieved, it is likely to request submissions on further remedy and the applicability of section 102 of the Scotland Act 1998 (eg *P* v *Scottish*

Ministers 2017 SLT 271; and *Hunter* v *Student Awards Agency for Scotland* 2016 SLT 563). In principle, a range of remedies may thereafter be granted, including a declarator that a provision is not law or there was no power to make it, or reduction of the offending provision.

From a judicial operational perspective, there is little evidence to support the idea that change is necessary.

d) In what circumstances does the HRA apply to acts of public authorities taking place outside the territory of the UK? What are the implications of the current position? Is there a case for change?

Beyond referring to Article 1 of the Convention, the *dicta* in *R (Sandiford)* v *Secretary of State for Foreign and Commonwealth Affairs* [2014] 1 WLR 2697 (at para 19) that jurisdiction is primarily territorial, and the exceptions set out in *Al-Skeini* v *United Kingdom* (2011) 53 EHRR 18 paras 133-137, there is no useful judicial comment to make.

e) Should the remedial order process, as set out in section 10 of and Schedule 2 to the HRA, be modified, for example by enhancing the role of Parliament?

There is no useful judicial comment to make.

ANNEX

HUMAN RIGHTS IN SCOTLAND – A SHORT JUDICIAL PERSPECTIVE

Introduction

Rights protected by the European Convention on Human Rights became part of Scots Law with the coming into force of the Scotland Act 1998 in advance of the Human Rights Act of the same year. The traditional view was that the Convention had limited impact on domestic jurisprudence as a non-incorporated international convention[1]. This view changed in the years immediately pre-dating the 1998 Acts[2]. By that time the Convention rights were beginning to be used to influence judicial decisions in particular contexts, especially in the field of criminal procedure and the related topic of the provision of legal aid[3]. The Scotland Act prohibited members of the Scottish Executive (now Government[4]) and the Parliament itself from acting in a manner contrary to the Convention. Once the Convention rights were formally incorporated, challenges began to grow in earnest in the criminal procedural field. The Convention was used to challenge major pieces of legislation in the civil law field, where it also had a considerable impact in the areas of family law and immigration and asylum.

Criminal Procedure, Evidence and Substance

The main thrust of human rights challenges was initially to criminal procedure; especially where that procedure did not reflect that in England. This type of challenge had been foreshadowed in pre 1998 cases. One of the most radical of those was *Boner* v *United Kingdom*[5]. This was a successful challenge to the then practice of relying, in part, on the judgment of counsel when deciding whether to grant legal aid for a relatively complex criminal appeal. The practical effect of the decision was the end of the automatic right of appeal in criminal cases in favour of a system in which each appeal required leave. Article 6 came to influence several of decisions of the High Court of Justiciary, in its criminal appeal capacity, under the chairmanships of Lords President Hope[6] and Rodger[7]. Appeals which were based on defective representation were introduced[8]. A much more open system of disclosure of documents,

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[1] *Surgit Kaur* v *Lord Advocate* 1980 SC 319 at 329
[2] *T, Petitioner* 1997 SLT 724 at 733
[3] *Shaw Petitioner* 1998 SCCR 672
[4] Known in litigation terms as "the Scottish Ministers"
[5] 1995 SCCR 1
[6] 1989-1996
[7] 1996-2001
[8] *Anderson* v *HM Advocate* 1996 JC 29 at 34

notably police statements, in criminal trial procedure was developed[9] in advance of the more modern statutory code.[10]

In the post devolution era, the incorporation of the Convention rights was seen as a convenient method of appealing prosecutorial decisions in routine criminal cases. This was on the basis, which the Crown accepted, that, no matter at what level the decision was taken, it was one of the Lord Advocate, who was a member of the Scottish Government, and thus subject to the devolution regime of the Scotland Act. The decision in a summary trial by a procurator fiscal depute could become a "devolution issue".

There came to be a proliferation of these "devolution issues" in criminal cases. They alleged multiple types of breach of the fair trial and reasonable time requirements of Article 6. There were many challenges, some of substance but many without merit. In criminal appeals, the High Court was seen as not being comfortable in dealing with the new law; decisions about which, for the first time, might lead to an appeal in a criminal case to the Privy Council[11]. This discomfort is most amply illustrated in an appeal by several Dutchmen who had been convicted of importing very substantial quantities of drugs. For the first (and last) time, the court was addressed on many occasions and at length by Dutch counsel[12].

Some of the points taken, which have had a significant impact on the system, were those complaining of delay[13]. Scots criminal procedure has some fairly challenging time limits; many of which cannot be complied with while at the same time, in the modern world of DNA and telephony evidence, ensuring a fair trial. There were multiple challenges on delay grounds, albeit that the time being taken was well within European norms. Most, but not all, of the pleas of delay were unsuccessful but their proliferation, as in several other areas where devolution issues were being taken, caused significant uncertainty to, and disruption of, the criminal justice system.

There was a significant successful challenge to the use of "temporary" sheriffs[14]; that is fee paid, rather than salaried, judicial office holders. This resulted in corrective legislation. Prior to that, the decision had a considerable impact on convictions and prosecutions. It still influences thinking on the use of fee-paid judicial office holders, which is largely discouraged

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[9] *McLeod* v *HM Advocate* 1998 JC 67

[10] Criminal Justice and Licensing (Scotland) Act 2010, Part 6 (Disclosure)

[11] And now the UK Supreme Court

[12] *Hoekstra* v *HM Advocate*: (No 1) 2000 SCCR 263; (No 2) 2000 JC 387; (No 3) 2000 JC 391; (No 4) 2000 JC 599; (No 5) 2001 SC (PC) 37; (No 6) 2001 JC 131; and (No 7) 2002 SCCR 135

[13] *Gibson* v *HM Advocate* 2001 JC 125; *Dyer* v *Watson* 2002 SC (PC) 89

[14] *Starrs* v *Ruxton* 2000 JC 208

in Scotland[15] in accordance with European (GRECO[16]) thinking. The use of dock identification was another area which was unsuccessfully challenged, but where practice rapidly changed[17].

The greatest impact on the system came with the UK Supreme Court[18] decision in *Cadder* v *HM Advocate*[19]. This declared that the practice of interviewing persons under detention, without ensuring that they had the option of the services of a solicitor, was contrary to Article 6. Its effect on pending prosecutions was very significant as have been the effects of changing the custody regime from one which had a maximum 6 hour detention period to one in which the system of detention has been eliminated but the period before an arrested suspect requires to be released is, of necessity, considerably longer.

In 2008, the senior judiciary made a rare plea to the Calman Commission on Scottish Devolution. This stated that:

> "the facility provided by section 57(2) of the Scotland Act, to challenge…any act of a prosecutor has led to a plethora of disputed issues, with consequential delays in the holding of trials and to the hearing and completion of appeals against conviction. The jurisdiction of [the Privy Council]… has arguably created, or at least substantially contributed to, delay in the handling of criminal business".[20]

The Calman Commission considered that the courts were outwith its remit, but the matter was taken up by an Expert Group led by Sir David Edward which concluded that:

> "it is because (and only because) the Lord Advocate is 'a member of the Scottish Executive' that her acts are subject to review as a devolution issue".[21]

Some 10,000 devolution issues had been tabled in the space of a decade. The matter was resolved with the passing of the Scotland Act 2012 which amended the relevant sections[22] of the 1998 Act by removing the acts of the Lord Advocate from the equation. Thereafter, there would, in criminal cases, be a new concept, namely the compatibility issue, which would replace the devolution issue and render the acts of the court susceptible to challenge as non-Convention compliant. This simple change radically reduced the number of challenges. This resulted in the Lord President's Working Group reporting to the Secretary of State in November 2018 that the system was now functioning satisfactorily.

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[15] This approach is not applied to the tribunal judiciary
[16] See recently its fourth evaluation on Leichstenstein (16 December 2020)
[17] *Holland* v *HM Advocate* 2005 SC (PC) 3
[18] Which included the former Lords President Hope and Rodger
[19] 2011 SC (UKSC) 13
[20] See the Review of ss 34 to 37 of the Scotland Act 2012 by Lord Carloway and his working group (February 2018) para 2.11
[21] *Ibid* para 2.14
[22] 34 to 37

There has been a major change to sentencing with the requirement to attach fixed punishment parts to life sentences. This was bought about by amendments introduced by the aptly named Convention Rights (Compliance) (Scotland) Act 2001. The, presumably unintended, consequence of this legislation has been to increase substantially the periods of imprisonment to which life prisoners are subjected. It is a contributor to the level of the prison population.

In relation to evidence, the impact of the European decisions on hearsay[23] did prompt a bit of activity but this has died down[24]. The effect of Article 8, as a bolster to the rape shield legislation[25], is an ongoing issue. It is not unreasonable to suggest that some judges have found this legislation, and the High Court's interpretation of it, problematic[26]. The latest development is an action for, *inter alia*, damages against the Scottish Ministers based on a sheriff's failure[27] to protect a complainer's article 8 rights in the course of a jury trial.

The impact of the Convention on the substantive law has been limited. A challenge, based upon Article 7, was mounted in relation to the scope of the charge of "breach of the peace". This failed[28] but it prompted redefining legislation[29]. The same occurred with the Offensive Behaviour at Football and Threatening Communications (Scotland) Act 2012[30], which was repealed. This has prompted new "Hate Crime" legislation[31]. A challenge, under Article 10, to a conviction of a person for breach of the peace stemming from the slogans on his clothing failed domestically[32] and in Europe[33].

Civil Law

The European Convention has had a significant impact on the arguments which are deployed over a wide range of civil litigation. Its use in immigration and asylum cases, and to a degree social security disputes[34], has been widespread, as it has in cases elsewhere in the United Kingdom. These subjects are not covered here.

The Scotland Act's provisions enabled interested parties to raise judicial reviews of Acts of the Scottish Parliament on the basis of non-compliance with the Convention[35]. The court has the power to strike down incompatible acts. There have been many challenges to statutes

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[23] *Al-Khawaja* v *United Kingdom* (2012) 54 EHRR 23
[24] Following *Schatshaschwili* v *Germany* (2016) 63 EHRR 14; see eg *AS* v *HM Advocate* 2020 SCCR 403
[25] Criminal Procedure (Scotland) Act 1995 ss 274 and 275; see recently *Macdonald* v *HM Advocate* 2020 JC 244
[26] See eg recently *Macdonald* v *HM Advocate* (*supra*)
[27] *Ibid*
[28] *Smith* v *Donnelly* 2001 JC 65
[29] Criminal Justice and Licensing (Scotland) Act 2010
[30] *Donnelly* v *Dunn* 2015 JC 266
[31] Hate Crime and Public Order (Scotland) Bill 2020
[32] *Maguire* v *Procurator Fiscal, Glasgow* [2015] HCJAC 36.
[33] *Maguire* v *United Kingdom* (2015) 60 EHRR SE 12.
[34] *Nyamayaro* v *Secretary of State for the Home Department* 2019 SC 537;
[35] Scotland Act 1998 s 29(1); and for secondary legislation s 54

covering a wide range of subjects. Almost all challenges to legislative competence have been unsuccessful. An early example was the foxhunting legislation[36].

One of the most celebrated cases was the challenge to the minimum pricing of alcohol[37]. The challenge failed, but only after the case had been to and from both the European Court of Justice and the UK Supreme Court. Challenges to mental health provisions, damages for asbestosis sufferers, tobacco advertising and cigarette machines, and the notification requirements for sexual offenders have all seen challenges, under Article 5, Article 1 of Protocol 1 and Article 8, fail[38]. Article 8 has had a substantial impact in cases involving the extent to which relatives should be entitled to be represented at Children's Hearings[39].

One of only two successful challenges to primary legislation was that to an innovative Bill under which every child would have a "named person"[40]. The challenge was successful only in relation to the information sharing provisions of the Bill being insufficiently clear to meet the requirements of Article 8. The legislation appears to have been abandoned, at least in its previous form. The other successful challenge related to agricultural holdings under A1 P1[41]. It resulted in amending legislation. Subsequent litigation in relation to the remedial measures and to obtain compensation was unsuccessful[42].

Significant areas in which the Convention has been used to challenge Governmental, as distinct from Parliamentary, activity has been in relation to prisoners' rights. The "slopping out" cases[43], which sought damages for keeping prisoners in inhumane or degrading conditions, succeeded. Although they produced small amounts of compensation for the individuals, they did result in the improvement of the prisons, to the benefit of future inmates. The right to attend rehabilitation courses is an area which recently reached the UK Supreme Court[44] as have smoking in mental health facilities[45], the segregation of prisoners[46] and the right of prisoners to vote[47].

The present and the future

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[36] *Friend* v *Lord Advocate* 2008 SC (HL) 107
[37] *Scottish Whisky Association* v *Lord Advocate* 2018 SC (UKSC) 94; primarily on EU grounds
[38] For the citations to these cases see Drummond *et al*: *A Practical Guide to Public Litigation in Scotland* para 3-041 fn 90
[39] *ABC* v *Principal Reporter* 2019 SC 186; *Principal Reporter* v *K* 2011 SC (UKSC) 91; *SK* v *Paterson* 2010 SC 186; see generally Poole: *Human Rights and Children's Hearings* 2016 JR 151
[40] *Christian Institute* v *Lord Advocate* 2017 SC (UKSC) 29
[41] *Salvesen* v *Riddell* 2013 SC (UKSC) 236
[42] *McMaster* v *Scottish Ministers* 2018 SC 546
[43] *Napier* v *Scottish Ministers* 2005 SC 229
[44] *Brown* v *Parole Board* 2018 SC (UKSC) 49; see also *Reid* v *Scottish Ministers* 2017 SC 372; Ansari v *Aberdeen City Council* 2017 SC 274
[45] *McCann* v *State Hospitals Board* 2017 SC (UKSC) 121
[46] *Shahid* v *Scottish Ministers* 2016 SC (UKSC) 1
[47] *Moohan Petitioner* 2015 SC (UKSC) 1

The incorporation of the Human Rights Act into Scots law by the Scotland Act has had a significant impact on Scots criminal procedure. Many will argue, with some force, that some aspects of the system have been changed for the better. Others will point to the negative elements of the new custody provisions, the disclosure regime and the use of police statements in criminal trials[48]. The effect of *Cadder* (*supra*) is still ongoing over ten years since it was decided. The Carloway Review[49] recommended significant changes to the custody and interview regime; almost all of which have been implemented[50]. It also favoured the abolition of the requirement for corroboration. This has not been implemented but is subject to further scrutiny of "post corroboration safeguards", including changing the Scots system of a majority verdict for guilty and abolition of the not proven option.

Although there continues to be debate in the political forum, the number of cases which are being launched on the basis of the European Convention has gradually reduced. This is because of the growing understanding of the Convention's place within the legal system; in particular that it does not represent a separate legal regime, which can be used as a means of altering longstanding laws and practices. Rather, it is something to be seen in the context of Scots law as a whole. In *Gorrie* v *MacLeod*[51] the court cited the *dicta Osborn* v *Parole Board*[52] that, when looking at the effect of the European Convention on domestic law, it was important to keep in mind that Convention rights are mostly expressed at a very high level of generality. Human rights was not, as many practitioners appeared to think, a distinct area of law but something which permeated the whole system. Where the Convention was founded upon, the remedy sought had to be one which was otherwise available under domestic procedures[53]. The first question for the court was whether Scots law was compliant with the Convention. If it was, the next question was not whether what had occurred in the particular case was compliant with the Convention as a generality, but whether it complied with the implementing domestic law.

In short, in criminal matters, the many problems which incorporation brought have largely been dealt with, albeit not altogether satisfactorily in all situations. Nevertheless, new areas do emerge where the UK Supreme Court has been asked to adjudicate on important issues[54] and where the High Court has welcomed its supra national input.

On the civil front, many of the applications which found upon human rights will proceed by petition for judicial review. Until the Gill Review[55], no permission to proceed with a judicial

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[48] See recently *Megrahi* v *HM Advocate* [2021] HCJAC 3 at para 57 *et seq*
[49] November 2011
[50] Criminal Justice (Scotland) Act 2016
[51] 2014 SCCR 187, LJC (Carloway) at paras [13] and [14],
[52] [2013] 3 WLR 1020, Lord Reed, paras 55-57
[53] *Sabiu* v *Wylie* 2014 SCCR 59, LJC (Carloway) at para [24]
[54] *AB* v *HM Advocate* 2017 SC (UKSC) 101: restrictions on defence in sexual offending (Art 8); *Sutherland* v *HM Advocate* 2020 SCCR 331: paedophile hunters
[55] *Scottish Civil Courts Review* September 2009

review was required. Since the implementation of its recommendations, the Courts (Scotland) Act 2014[56] has required such permission. A litigant must demonstrate that the application has real prospects of success. If refused, there is a relatively speedy and summary appeal process[57] which, after some teething troubles, is now working well.[58] The effect of this is that only cases having substance will proceed beyond the permission stage. These cases are usually well argued and have a real point for determination. They do not cause the system any significant operational difficulties.

As with the criminal law, most of the early problems, whereby some rather eccentric cases were being presented, are largely things of the past. Practitioners have become more familiar with the Convention's jurisprudence; notably with what arguments, under reference to which articles, have a real prospect of success. The judges themselves are much more comfortable when dealing with Convention points. The senior judiciary have a constructive dialogue with their counterparts in the European Court of Human Rights. This has promoted greater understanding of each other's systems. The effect of the *dicta Osborn* v *Parole Board*[59] has helped calm the waters. The references in the Convention to the need for matters to be in accordance with the law are read in conjunction with the domestic concept of legality.

Overall, the incorporation of the Convention rights has enabled the modern generation of lawyers to develop structures within which the lawfulness of interferences with these rights might be tested, but within an overall structure which encourages and permits the use of judicial restraint. As a final guide, the level of references from Scotland to the European Court of Human Rights, although always low, appears to have declined.

[56] S 89 introducing s 27B into the Court of Session Act 1988
[57] 1988 Act s 27D
[58] *Prior* v *Scottish Ministers* 2020 SC 528
[59] (*supra*)